

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of the Commission's Rules)	WT Docket No. 97-82
Regarding Installment Payment Financing)	
For Personal Communications Services)	
(PCS) Licenses)	

To: The Commission

COMMENTS OF COOK INLET REGION, INC.

June 22, 2000

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SUMMARY

The Commission proposes a major restructuring of the C and F block auction rules. Some of the proposed changes to the rules are warranted by changes in the PCS marketplace. However, while the Commission is being responsive to the marketplace, it also should ensure competitive parity by removing restrictions on incumbent C and F block licensees. Specifically, Cook Inlet Region, Inc. ("CIRI") asks that the Commission lift transfer restrictions on incumbent C and F block licensees. It would be manifestly unfair to maintain transfer restrictions on incumbent licensees while imposing none on new C and F block licensees that win their licenses in open auctions. Furthermore, requiring build-out of licenses before permitting transfer forces economically irrational choices and disserves the public. If the Commission does impose some build-out requirement before transfer, build-out should be evaluated on a system-wide, rather than market-by-market, basis.

CIRI agrees with the Commission's proposal to open the auction by breaking up 30 MHz C block licenses into three 10 MHz licenses and allowing open bidding on some of the resulting licenses in each of two "tiers." The Commission's compromise is a reasonable response for a range of parties with legitimate and frequently competing interests. Moreover, CIRI agrees that open bidding on F block, 15 MHz C block, and previously unsold licenses will allow spectrum to be acquired by parties most willing to put it to use. CIRI also agrees with the Commission's decision to lift the license cap, which served its original purpose but now has outlived its usefulness. Maintaining the license cap would serve only to further penalize incumbent C and F block licensees. Finally, CIRI agrees that the Commission should not offer bidding credits in closed auctions in which such credits become meaningless.

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COMMENTS OF COOK INLET REGION, INC.

I. INTRODUCTION.

Cook Inlet Region, Inc. ("CIRI"),¹ respectfully submits these comments in the above-captioned proceeding regarding revision of the C and F block auction rules. In the *Notice*,² the Commission proposes a major restructuring of the C and F block auction rules. Given current developments in the PCS marketplace, some of the changes that the Commission proposes are warranted. However, in designing new auction rules to benefit the widest range of PCS providers and opening C and F block licenses to all providers without restrictions, the Commission should ensure competitive parity and not leave incumbent C and F block licensees hamstrung by restrictions that have outlived their usefulness.

¹ CIRI is an Alaska Native Regional Corporation organized pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* CIRI PCS entities qualify as "entrepreneurs" under the Commission's rules and provide service in many areas of the United States. A CIRI entity was the first C block licensee in the United States to launch commercial service.

² Further Notice of Proposed Rulemaking, *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, FCC 00-197 (rel. June 7, 2000) ("*Notice*").

II. THE COMMISSION SHOULD LIFT TRANSFER RESTRICTIONS ON INCUMBENT C AND F BLOCK PCS LICENSEES IF IT PERMITS OPEN BIDDING.

A. Incumbent Licensees Should Not Face Limits On Transferring Licenses If Their Competitors Are Not Restricted.

The Commission tentatively concludes "that C and F block licenses won pursuant to open bidding at Auction No. 35, or any future open auction for such spectrum, would not be subject to a transfer holding rule."³ However, when the Commission discusses relief for incumbent C and F block licensees, it merely seeks comment on permitting flexibility in exchanging or transferring licenses based on some measure of completion of build-out requirements.⁴ CIRC respectfully submits that any transfer restrictions on incumbent C and F block licensees would be inequitable and would skew the marketplace if open auction license winners for C and F block licenses would not be subject to such restrictions. It would be manifestly unfair now to *prospectively and selectively* eliminate rules that currently apply to all C and F block licensees.

Small businesses such as the CIRC entities have taken staggering risks and entered one of the most competitive markets in telecommunications. They have done so under rules that, among other things, restrict their ability to alter their investment strategy, rationalize their footprint, and raise new capital to acquire licenses in the same manner that their large competitors can. The holding period rules and transfer requirements, which create these constraints, have outlived their usefulness. Such rules originally were designed to ensure that

³ *Id.* at ¶ 44.

⁴ *See id.* at ¶¶ 44-45.

entrepreneurs do not quickly resell licenses for which they had a bidding preference and that they retain control of their companies,⁵ concerns which no longer apply.

Incumbent C and F block licensees have retained their licenses and initiated service in many areas, but wireless providers are rapidly consolidating to establish national footprints. The examples are numerous: Verizon/Vodafone, BellSouth/SBC, and VoiceStream/Omnipoint/Aerial, among others. Transfer restrictions on incumbent licensees serve only to prevent them from responding to these consolidations, rather than prevent a subversion of the original goals for the entrepreneurs' blocks. Terminating the transfer restrictions now would allow incumbent licensees to rationalize their holdings by exchanging and transferring licenses that do not mesh with how their systems have developed in order to acquire licenses that complement their systems. Incumbent licensees also would be able to sell non-complementary licenses in order to raise capital that is needed to bid in Auction No. 35, to purchase licenses in the secondary market, or to build out other markets they already own. Many licenses that have not been built out would end up in the hands of providers with the incentive to quickly begin building out and increasing service to the public.

Once before, the Commission loosened transfer requirements on C and F block licenses in response to market conditions. In 1996, the Commission relaxed the holding requirement for C and F block licensees and allowed transfer or assignment during the first five years to other entrepreneurs.⁶ The Commission did so because "strict holding requirements may

⁵ See Fifth Report and Order, *In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, 9 FCC Rcd. 5532, at ¶ 128 (1994).

⁶ See Report and Order, *In re Amendment of parts 20 and 24 of the Commission's Rules*, WT Docket No. 96-59, *Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*, GN Docket No. 90-314, 11 FCC Rcd. 7824, ¶¶ 83-84 (1996).

actually be hampering the ability of entrepreneurs to attract the capital necessary to construct and operate their systems."⁷ In short, the Commission facilitated license transfers so that licenses would be more likely to be built out. Today, the rapid consolidation in the PCS industry substantially intensifies these concerns, and the Commission likewise can facilitate build-out by lifting transfer restrictions altogether so that service is initiated more quickly because licenses are transferred to providers most likely to put them to efficient and effective use.

B. If The Commission Requires Build-Out Before Allowing License Transfers, Build-Out Should Be Measured On A System-Wide Basis.

The Commission seeks comment on evaluating build-out by an incumbent licensee on a system-wide basis rather than on a market-by-market basis as a precondition to allowing a licensee to exchange or transfer a C or F block license.⁸ CIRI begins by noting that imposing a build-out requirement on small incumbent C and F block licensees but eliminating it for large new C and F block licensees, perpetuates, rather than solves, the problems described above. Having said that, if the Commission requires any build-out before permitting license transfer, the only reasonable method for evaluating build-out is on a system-wide basis.

Building out a license in order to exchange or transfer it – as would be required with a market-by-market build-out analysis – is not economically rational, forces non-marketplace choices, and could actually slow service to the public. For example, an incumbent licensee may hold a C block license for a particular BTA but hold few or no licenses in the rest of the corresponding MTA. If the licensee has decided that it must transfer that license to rationalize its license holdings overall, it may make little economic sense to build out the license

⁷ *Id.* at ¶ 84.

⁸ *See Notice* at ¶ 45.

in the BTA before trading or selling it. It is even less rational to build out the license if the licensee's chosen technology is different from that of the most rational buyer. Much money would be spent simply to comply with build-out requirements before exchanges or transfers, but ultimately there would be no public benefit if the transferee has to reconfigure or rebuild the facilities.⁹ In fact, rebuilding an incompatible system can cause needless consumer upheaval and dissatisfaction as well as create zoning and tower siting complexities and substantial financial hardship for both buyer and seller. It would present a significant barrier to otherwise efficient transactions.

Simply put, a build-out precondition to transfer is economically unsound and disserves the public. However, if the Commission does impose a build-out precondition, it at least should evaluate build-out on a system-wide basis. It should be a sufficient guarantee of a licensee's purpose and sincerity that it has initiated service across a broad range of its C and F block licenses. Consequently, any build-out precondition to transfer should be satisfied by a provider showing that it provides "substantial service" across all C and F block licenses that a party ultimately controls.

⁹ See Memorandum Order and Opinion on Review, *Bill Welch; For Commission Consent to Transfer Control of the Florence, Alabama Non-Wireline Cellular Permit to McCaw Communications of Florence, Inc.*, 3 FCC Rcd. 6502, ¶ 19 (1988) (approving for-profit sales of unbuilt cellular authorizations to increase service to public) ("*Bill Welch*"). "[A]llowing for-profit sales of unbuilt authorizations is likely to reduce costs to the public because carriers operating wide-area systems will be able to operate the systems more efficiently, without having to rebuild incompatible systems, which in turn will allow them to compete better." *Id.* (citing *Madison Cellular Telephone Co.*, 2 FCC Rcd. 5397 (Com. Car. Bur. 1987)).

C. The Commission Could Impose A Short Holding Period On Licenses Won In Closed Bidding In Auction No. 35.

By allowing entrepreneurs an opportunity to participate in the PCS marketplace, the C and F blocks have served their purpose.¹⁰ Now, incumbent C and F block licensees find themselves in competition with some of the largest telecommunications companies in the world that intend to bid in the open auctions of Auction No. 35. Thus, as explained, it would be unfair to maintain transfer restrictions on incumbent licensees. However, some modest transfer restrictions for licenses won in the closed auctions proposed for Auction No. 35 – even though restrictions would temporarily inhibit free competition by small providers – probably are necessary to ensure that qualified entrepreneurs are acquiring licenses for their own participation.

CIRI believes that the Commission should institute a holding period of one year from the close of Auction No. 35 for all licenses won in closed bidding. In that way, the closed auctions would encourage meaningful participation by qualified entrepreneurs without the fear that some bidders merely would be stand-ins for larger providers. At the same time, a one-year holding period would not be so forbidding as to discourage participation by qualified entrepreneurs afraid of ultimately being saddled with non-transferable licenses.

¹⁰ Cf. Memorandum Opinion and Order, *In re Metromedia Co.; For Consent to Transfer of Control of Metromedia Company*, 1 FCC Rcd. 1227, ¶ 25 (1986) (citing *James F. Rill*, 60 Rad. Reg. 2d (P&F) 583 (1986), for proposition that the cellular wireline set-aside was application processing tool and was not meant to prevent later transfers between wireline and non-wireline carriers).

III. THE COMMISSION'S TENTATIVE CONCLUSIONS TO BREAK UP 30 MHz C BLOCK LICENSES AND TO OPEN BIDDING ON SOME OF THE RESULTING 10 MHz LICENSES ARE SUPPORTED BY CURRENT PCS MARKET CONDITIONS.

The heart of the Commission's proposed changes to the C and F block auction rules involves breaking up the 30 MHz C block licenses into three 10 MHz licenses¹¹ and allowing open bidding on two of three 10 MHz licenses in large markets and on one of three 10 MHz licenses in smaller markets.¹² The Commission concludes that this "tiered" solution balances the increasing need for unrestricted spectrum in larger markets while preserving eligibility restrictions in a portion of all markets with eligibility restrictions greatest in mid-sized and smaller markets where entrepreneurs have had more success.¹³ CIRI agrees that the Commission's proposal offers a reasonable response for a range of parties with legitimate and frequently competing interests. Moreover, making additional spectrum available to all bidders is rational "based on the demand for spectrum to satisfy congestion, new technology and competitive needs."¹⁴

Breaking the 30 MHz licenses into three 10 MHz licenses preserves a meaningful – and realistic – opportunity for small business participation, although it does come at the expense of rational market competition. That is, a 30 MHz license may be valuable to a new competitor seeking to enter a market, while one 10 MHz license may be insufficient and more than one 10 MHz license difficult to acquire. On the other hand, the value of one 30 MHz license may be so great that it is difficult for an entrepreneur to obtain, while a 10 MHz license

¹¹ *See Notice* at ¶ 16.

¹² *See id.* at ¶ 28.

¹³ *See id.* at ¶ 26.

¹⁴ *Id.*

may be more realistically within its reach. Also, breaking larger licenses in to three 10 MHz licenses may present partnering opportunities for entrepreneurs.

No matter how pressing the need for unrestricted spectrum, opening bidding on even some C block licenses necessarily upsets the expectations of original C block bidders. When open bidders win identical licenses that have no transfer restrictions, not only are legitimate business expectations upset, but incumbent C block licensees also are left mired in a tangle of transfer restrictions that simply do not apply to their larger competitors. Consequently, while the Commission has found a workable compromise by opening bidding on some C block licenses, the solution is only fair if the Commission lifts existing transfer restrictions so that incumbent licensees can compete on equal footing with all C block licensees.

The Commission also proposes to open bidding on available F block licenses,¹⁵ on available 15 MHz C block licenses,¹⁶ and on C and F block licenses that go unsold in Auction No. 35 or in future auctions.¹⁷ The Commission observes that open bidding for these licenses will see that the licenses are won by PCS providers most likely to quickly initiate service to the public.¹⁸ It is difficult to contest the notion that if entrepreneurs have been unable or unwilling to provide service in particular license areas, then eligibility restrictions should be lifted to allow the introduction of service by any provider. CIRC supports the Commission's efforts to see that spectrum is quickly put to use. However, CIRC respectfully suggests that the Commission should be consistent in adopting rules to facilitate the movement of spectrum to those who will use it

¹⁵ See *id.* at ¶ 31.

¹⁶ See *id.* at ¶ 32.

¹⁷ See *id.* at ¶ 33.

¹⁸ See *id.* at ¶¶ 31-33.

most efficiently. The same rationale that supports opening bidding on F block licenses and unsold licenses – moving spectrum to efficient users – supports lifting transfer restrictions on incumbent licensees holding similar licenses.

IV. CIRI SUPPORTS THE COMMISSION'S TENTATIVE CONCLUSION TO LIFT THE LICENSE CAP.

The Commission tentatively concludes that it should lift the license cap, found at 47 C.F.R. § 24.710, that currently limits an auction applicant from winning more than 98 C and F block licenses.¹⁹ The Commission observes that it "has achieved its initial objective of a fair distribution of C and F block licenses."²⁰ Moreover, the Commission proposes to create 186 new C block licenses while allowing more competitors to bid on many C and F block licenses.²¹ CIRI agrees that the license cap has served its original purpose and now has outlived its usefulness. Maintaining the license cap while the entire PCS industry moves toward consolidation and national footprints would serve only to penalize all C and F block licensees – and the customers of their systems – by ensuring that none could grow its system to provide legitimate competition to the major PCS providers. CIRI also agrees with the Commission that more entities bidding on more licenses likely will mean continued diversity among C and F block licensees.

V. BIDDING CREDITS ARE UNNECESSARY IN CLOSED AUCTIONS.

The Commission suggests that it could eliminate bidding credits in closed auctions because "they are unnecessary and perhaps even counterproductive in ensuring

¹⁹ *See id.* at ¶ 47.

²⁰ *Id.*

²¹ *See id.*

opportunities for small business in the set-aside auctions."²² CIRI agrees that bidding credits are financially meaningless in a closed auction in which all participants have them. When all participants have bidding credits, all bids will be equally inflated. As Professor Peter Cramton has observed in testimony before the Senate Budget Committee, "[t]he reality has been that the bidding credits are often bid away by competition among designated entities."²³ Consequently, the Commission should not offer bidding credits for closed auctions in which only small businesses are bidding.

²² *Id.* at ¶ 42.

²³ Professor Peter Cramton, *Lessons from the United States Spectrum Auctions*, Testimony before the United States Senate Budget Committee (Feb. 10, 2000).

VI. CONCLUSION.

The PCS marketplace continues to evolve. The Commission's C and F block auction rules should evolve with the marketplace. Some of the Commission's proposed revisions to the C and F block auction rules do respond to market changes effectively. However, the Commission should not unfairly continue to restrict incumbent C and F block licensees while creating new opportunities for their competitors. Accordingly, CIRI urges the Commission to lift transfer restrictions on incumbent C and F block licensees, to remove the license cap on C and F block licensees, and to decline to award unnecessary bidding credits in C and F block auctions that remain closed to all but small businesses.

Respectfully submitted,

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